87-694

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TUNYA REGINERA POITIER, Petitioner.

v.

UNITED STATES OF AMERICA, Respondent,

On Petition for Certiorari to the
United States Court of Appeals, Eighth Circuit

****

Petition for Writ of Certiorari

****

HOWARD SOHN
Attorney for Petitioner
2534 Southwest Sixth Street
Miami, Florida 33135-2926
Telephone: (305) 643-0101

QUESTION PRESENTED

WHETHER THE PETITIONER WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SHE WAS SURROUNDED AND STOPPED IN A PUBLIC AIRPORT CONCOURSE BY APPROXIMATELY SEVEN ARMED LAW ENFORCEMENT AGENTS, DIRECTED TO AND SEATED IN A SECLUDED WAITING AREA, WHERE SHE WAS QUESTIONED BY OFFICERS WHOSE OBJECTIVE FROM THE OUTSET WAS TO SEARCH HER AND FIND DRUGS AND, AFTER RESPONDING TRUTHFULLY, WAS ACCUSED OF CARRYING NARCOTICS AND READ MIRANDA RIGHTS.

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PREFACE

The Petitioner, TUNYA REGINERA POITIER, was the appellee in the United States Court of Appeals for the Eighth Circuit and the defendant in the United States District Court for the Eastern District of Arkansas, Western Division.

The Respondent, United States of America, was the appellant in the United States Court of Appeals for the Eighth Circuit and the prosecution in the trial court before the United States Distict Court Eastern District of Arkansas, Western Division.

In this brief, the parties will be referred to as they appeared in the United States District Court, Eastern District of Arkansas, Western Division. All emphasis is supplied unless the contrary is indicated.

The following reference is made in this brief: "(App.)" for the Petitioner's Appendix which contains portions of the record below sufficient to show jurisdiction in this Court and which consists of pages App. 1 through App. 17.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at United States of America v. TUNYA REGINERA POITIER, Case No. 86-1616, decided May 13, 1987.

JURISDICTION

On March 19, 1986, the Honorable George Howard Jr., United States District Judge for the United States District Court, Eastern District of Arkansas, Western Division, at the conclusion of an evidentiary hearing in regard to the Defendant's Motion to Suppress Evidence, and in a written Order dated April 2, 1986, granted the Defendant's Motion to Suppress Evidence and Statements consisting of approximately one-kilogram of cocaine seized from the Defendant, TUNYA REGINERA POITIER, and certain statements/admissions made by the Defendant at the time of her detention on December 19, 1985, on the grounds that her initial detention/seizure was not supported by reasonable and articulable suspicion that she had committed or was currently committing a crime.

In the opinion filed May 13, 1987, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the District Court ordering suppression of the evidence in this case.

In an opinion dated July 30, 1987, the United States Court of Appeals for the Eighth Circuit denied the Defendant's Petition for Rehearing with, Justices Heaney, McMillian and Arnold dissenting and advising that they would have granted the Defendant's Petition for Rehearing in the instant case.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3) and the Fourth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On January 22, 1986, the Defendant, TUNYA REGINERA POITIER, was indicted by a grand jury on two counts: (1) conspiracy to distribute cocaine, and (2) possession with intent to distribute approximately one-kilogram of cocaine.

On March 17, 1986, the Honorable George Howard, United States District Judge for the United States District Court, Eastern District of Arkansas, Western Division, heard evidence and testimony in an evidentiary hearing in support of the Defendant's Motion to Suppress Evidence and Statements, and based thereon concluded that the Defendant, TUNYA REGINERA POITIER, was initially seized/detained within the meaning of the Fourth Amendment and this detention was not supported by reasonable and articulable suspicion that she had committed or was currently committing a crime and, accordingly, granted the Defendant's Motion to Suppress Evidence and

pronounced its findings of fact and conclusions of law at the conclusion of said hearing and in a written Order dated April 2, 1986.

On May 13, 1987, the United States Court of Appeals for the Eight Circuit reversed the judgment of the District Court ordering suppression of the evidence in this case and under the "clearly erroneous" standard concluded that the District Court misapplied the pertinent case law to the facts at issue by holding that the initial contact between the Defendant, TUNYA REGINERA POITIER, and the law enforcement agents did not constitute a seizure and/or detention but was a consensual encounter not invoking any Fourth Amendment protections.

On August 5, 1987, the United States Court of Appeals for the Eighth Circuit denied the Defendant's Petition for Rehearing and for Rehearing en banc, with three judges, Judge Heaney, Arnold, and McMillian dissenting and stating that they would have granted the Defendant's Petition for Rehearing.

In the instant petition, the Defendant, TUNYA REGINERA POITIER, challenges the propriety of the United States Court of Appeals for the Eighth Circuit's ruling that the initial contacts between the agents and the Defendant, TUNYA REGINERA POITIER, was a consensual encounter not a seizure and/or detention within the meaning of the Fourth Amendment and United States v. Mendenhall, 446 U.S. 544 (1980).

The facts as relied upon by the United States Court of Appeals for Eighth Circuit in reversing the trial court's suppression order, and which purportedly describe the events involving the contact between the Defendant, TUNYA REGINERA POITIER, and the law enforcement agents at the Little Rock Municipal Airport, are as follows:

> Based on this information, DEA agents in Little Rock decided to establish a surveillance team at the Little Rock airport to watch Flight No. 705 from Atlanta. During a debriefing session before the plane landed, the team was told to let Harvey and Poitier go on their way if they did not want to cooperate

with the officers or answer questions. After 4:00 p.m. that afternoon, the surveillance team saw two people matching the descriptions of Harvey and Poitier leaving Flight No. 705. Harvey left the plane before Poitier and walked at first approximately 15 to 20 feet ahead of her, but she eventually caught up with him and they spoke, although walking about four feet apart. Little Rock narcotics detective David Hudson and DEA Special Agent Edward DiScenza then approached Poitier from both sides and DiScenza produced DEA credentials, while another five or six federal and local agents stoped Harvey in the same area. DiScenza told Poitier that he wanted to ask her some questions, she agreed, and he suggested that they move out of the main concourse towards the lesser-populated waiting area of Gate 1 of the terminal. DiScenza asked Poitier her name and for identification, which she provided. He asked her where she was from, and she replied that she was from Miami, Florida. When asked what she was doing in Little Rock, Poitier stated that she was there to party for a few days with her boyfriend. She identified Harvey as her boyfriend and said she had known him for about six months.

DiScenza walked over to Harvey and asked him if he knew Poitier.

> Harvey said that he barely knew her and had just met her in Miami. The inconsistent information made DiScenza suspicious and he told Poitier that he suspected her of carrying drugs from Florida. He gave her oral Miranda warnings, and she told him that she understood them. Then Hudson asked her directly if she was carrying drugs and she answered that she was. When asked what type of drugs she was carrying, she answered cocaine. She was then placed under arrest and searched, and about one kilogram of cocaine was found.

While purportedly accepting the District Court's findings of facts and unable to state that they were clearly erroneous, the Eighth Circuit Court of Appeals clearly substituted its own view of the evidence for that of the District Court in finding and/or concluding that "the District Court misapplied the pertinent case law to the facts at issue" and reversed the judgment of the District Court ordering suppression of the evidence and statements in this case.

The Eighth Circuit held, notwithstanding the factual findings of the District Court, that the contact

between TUNYA REGINERA POITIER and the law enforcement agents in the airport concourse and subsequent thereto was a consensual encounter within the meaning and parameters of the United States v. Mendenhall, 446 U.S. 544 (1980), and premised its finding upon certain language in Mendenhall which states that "a person is seized only when by means of physical force or a show of authority, his freedom of movement is restrained." Mendenhall at 553.

The Eighth Circuit then incredibly found that there was no such restraint present in this case sufficient to constitute a seizure and/or detention of TUNYA REGINERA POITIER, at least until Larry Harvey (the co-defendant) and TUNYA REGINERA POITIER, purportedly gave the agents inconsistent information.

REASON FOR GRANTING THE WRIT

The instant Petition for the issuance of a Writ of Certiorari should be granted on the basis that the United States Court of Appeals for the Eighth Circuit misconstrued and misapplied the holding and language of Mendenhall to the facts as found by the District Court and as found in the lower court record.

Further, this Petition should be granted based on the United States Court of Appeals for the Eighth Circuit's violation of the "clearly erroneous standard" in reviewing the District Court's determinations and by virtue of its misconstruing and misapplying further the holding of Reid v. Georgia, 448 U. S. 438 (1980), to the facts of the instant case.

As this Court previously stated in Mendenhall, there do exist communications and/or contacts between law enforcement officers and citizens that are consensual in nature and involve no coercion or restraint of

liberty and as such constitute encounters outside the scope of the Fourth Amendment.

As explicitly found, however, by the District Court, the fact finder in the instant case who had the opportunity to observe the credibility and demeanor of the witnesses and who had the opportunity to make the distinction between a consensual encounter and seizure in the instant case, it is evident and readily apparent that the Eighth Circuit Court of Appeals, in reversing the District Court's suppression order, clearly ignored, overlooked, and misapplied a number of the essential facts in the lower court order and record which conclusively establish that the initial contact between the Defendant, TUNYA REGINERA POITIER, and the law enforcement agents was a seizure and/or detention within the meaning of Mendenhall and its progeny.

Specifically, as reflected in the orders/opinions attached hereto (Appendix) and the lower court record, TUNYA REGINERA POITIER was approached by law enforcement

cement agents in the public concourse of the Little Rock Municipal Airport from the left- and right-hand sides. The agents then placed a badge in front of TUNYA REGINERA POITIER's face while stepping right in front of her, thereby physically stopping her progress and movement and blocking her path in the airport concourse area.

At this point TUNYA REGINERA POITIER was surrounded and confronted by approximately seven armed law enforcement agents who then directed her off the public concourse to a secluded waiting area by Gate 1 at the airport with a statement "let's go over here."

TUNYA REGINERA POITIER then was seated in a chair in the waiting area while two armed law enforcement agents, S/A DiScenza of the Drug Enforcement Administration and Detective Hudson of the Little Rock Police Department, chose to stand over her and in front of her in an admittedly less than casual atmosphere, effectively boxing TUNYA REGINERA POITIER in and providing her no means of exit and/or escape.

Further, according to the testimony of S/A Hudson, he was armed and the weapon did create a bulge in his clothing, which was possibly visible to TUNYA REGINERA POITIER during the agents' contact with her.

It was at this point, after being confronted by seven armed agents, directed to a secluded waiting area, and boxed-in by two armed agents, that TUNYA REGINERA POITIER was questioned by the agents seeking information to which they admittedly already knew the answers.

Further, during the course of this contact with TUNYA REGINERA POITIER, the agents received truthful answers from her as to her name, destination, documentation, and travel itinerary.

Additionally, during the course of this detention/seizure the agents never told TUNYA REGINERA POITIER that she did not have to talk to them, that she had the right to leave, and that the agents could not force her to stay if she desired to leave.

The agents also never advised TUNYA REGINERA POITIER that she had a right to refuse to be searched

and very candidly acknowledged that they relied upon her ignorance of her rights, her lack of knowledge as to her right to leave, and her apparent submission to authority.

Finally, as candidly admitted and acknowledged by Detective Hudson in the suppression hearing before the District Court, it was the agents' objective from the outset in initially stopping and detaining TUNYA REGINERA POITIER to search her and find drugs.

It is these facts which mandated the trial court's conclusion/holding that the agents' contact with TUNYA REGINERA POITIER constituted a detention and/or seizure within the meaning of the Fourth Amendment.

Since the Eighth Circuit's conclusion and/or holding was predicated upon a misapplication of the pertinent case law to the facts found by the District Court in the lower court record, the Eighth Circuit was clearly erroneous in reversing the judgment of the District Court and its Order suppressing the evidence in

the instant case, thereby mandating the granting of this Petition for Certiorari by this Court.

Clearly, these facts as reflected above and accepted by the Eighth Circuit, in light of the language in Mendenhall that "a person is seized only when by means of physical force or a show of authority, his freedom of movement is restrained," are more than sufficient to support the trial court's determination that the contact between the defendant and the law enforcement agents was a seizure/detention and not a consensual encounter.

Ironically, Reid v. Georgia, one of the cases cited by the Eighth Circuit in its opinion reversing the trial court's suppression order, conclusively establishes that the contact between the law enforcement agents and TUNYA REGINERA POITIER in the instant case constituted a seizure and/or detention within the meaning of Mendenhall, its progeny, and the Fourth Amendment.

In Reid, which is based on facts similar and actually more incriminating to the defendant, Reid, than

the Defendant, TUNYA REGINERA POITIER, this Court classified the contact between the law enforcement agents and the defendant, Reid, at the airport as a seizure not a consensual encounter.

This conclusion is further compelled by a review of Unites States v. Walraff, 705 F.2d 980 (8th Cir. 1983), a case relied upon by the Eighth Circuit in its May 13, 1987, opinion, and the case of United States v. Berryman, 717 F.2d 651 (1st Cir. 1983), a case relied upon by the Defendant before the Eighth Circuit.

Specifically, Reid and Berryman, as well as Florida v. Royer, 103 S.Ct. 1319 (1983), United States v. Batino, 649 F.2d 724 (9th Cir. 1981), United States v. Berry, 670 F.2d 583 (11th Cir. 1982), and United States v. Gooding, 695 F.2d 78 (4th Cir. 1982), which reiterate and enumerate certain factors to be considered by the trial court in determining whether the contact between law enforcement agents and an individual constitutes a seizure and/or consensual encounter, mandate and compel

the conclusion that the contact between TUNYA REGINERA POITIER and the law enforcement agents in the airport concourse was a seizure and not a consensual encounter as interpreted and decided by the Eighth Circuit, contrary to the District Court's findings of fact in the lower court record.

Specifically, these respective courts and this Court have explicitly and specifically found that blocking an individual's path or progress, failing to tell an individual he was free to leave, failing to tell an individual he had the right to refuse to answer any questions, prolongation of questioning when preliminary questions failed to raise any suspicion of criminal activity and the number and position of the detaining officers are relevant and essential factors in determining whether the police/citizen contact constitutes a seizure as opposed to a consensual encounter.

Clearly, the facts as enumerated above and analyzed in conjunction with Reid, Walraff, Berryman, Royer,

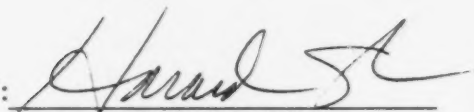
Mendenhall, and the other cited cases conclusively establish, as the District Court found, that the contact between TUNYA REGINERA POITIER and the law enforcement agents was not a consensual encounter, but a seizure and/or detention under Mendenhall and its progeny. Further, as recognized by the District Court and by the Eighth Circuit, no reasonable suspicion existed to justify this initial seizure, thereby mandating the granting of the instant Petition for Certiorari in order to reinstate the trial court's suppression Order in the instant case.

CONCLUSION

Based upon the foregoing authorities and analysis, the Petitioner would respectfully urge this Honorable Court to invoke certiorari jurisdiction is this cause.

Respectfully submitted,

LAW OFFICE OF HOWARD SOHN
Attorney for Petitioner
2534 S. W. 6th Street
Miami, Florida 33125-2926
Telephone: (305) 643-0101

BY: 
HOWARD SOHN

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. LR-CR-86-9

TUNYA REGINERA POITIER DEFENDANT

ORDER

On January 22, 1986, defendant Tunya Reginera Poitier was indicted by a Grand Jury on two counts: 1) conspiracy to distribute cocaine, and 2) possession with intent to distribute approximately one kilogram of cocaine. On March 17, 1986, this Court heard evidence in support of defendant's motion to suppress the approximately one kilogram of cocaine seized from defendant and admissions made by defendant at the time of her detention on December 19, 1985, on the ground that the detention was not supported by reasonable and articulable suspicion that she had committed or was currently committing a crime.

I.

FACTS

Special Agent Paul J. Markonni with the United States Drug Enforcement Administration in Atlanta testified that, because Miami, Florida, is a known source city of cocaine, he routinely observes incoming Miami flights at the Atlanta International Airport. On December 19, 1986, he observed defendant, who was well dressed, wearing a two piece suit, and possessed no luggage, but only a pocketbook and a suitbag, as she got off Delta Airlines Flight No. 817 which was running late. There was nothing significant about defendant. Defendant approached the Delta Airlines agent standing near Markonni to ask for the departure gate for her continuing flight to Little Rock, Arkansas. Special Agent Markonni stated he watched defendant as she walked alone down the concourse. Seconds later, another individual, later identified as Larry Gene Harvey, who was dishe-

veled and dressed in older clothes, passed Special Agent Markonni and the Delta Airlines agent, caught up with defendant, and, although the two did not walk together, engaged in a conversation with her. Special Agent Markonni stated that this behavior aroused his suspicion, and at this point he began a surveillance of defendant and Harvey. As the two walked down the concourse, they moved closer together until they were actually walking together and appeared to be more openly in conversation. Upon arriving at the departure gate for Little Rock, they surrendered their tickets to the flight attendant and boarded the plane. Special Agent Markonni stated that he retrieved the tickets and obtained copies of the Delta Airline reservation records for the two passengers, Tunya Poitier and Al Harvey. The reservation records reflected reservations made at precisely the same moment with an identical home telephone contact number and were paid for by cash. The

tickets were issued sequentially but for seats approximately twenty rows apart. Special Agent Markonni then called the telephone number listed on the reservation records, and the woman answering the telephone, in response to his question, replied there was no one by the name of Al Harvey at that address, but that defendant could be expected back the following day. Special Agent Markonni testified that he found the foregoing circumstances, taken together, suspicious and unusual. He then telephoned the Resident Agent in charge of Drug Enforcement Agency in Little Rock, Arkansas, to advise that office of the circumstances of travel and the descriptions of defendant and Al Harvey.

Special Agents from the Drug Enforcement Agency in Little Rock and officers from the Little Rock Police Department testified that on December 19, 1985, they observed two individuals who fit the descriptions of defendant and Al Harvey exit Delta Airline Flight 705,

proceed down the concourse, and, although they were about twenty feet apart, they made eye contact and drifted away. Special Agent Ed DiScenza and Little Rock Police Detective David Hudson testified that just before the couple passed the security station, the two officers approached defendant, disclosed their identification and advised her that they wanted to ask her some questions. The officers "gestured" to a seated area for defendant to move to from the traversed area of the concourse. Defendant was asked to identify herself and why she was in Little Rock. She told the officers her name and that she had come to Little Rock to party with her boyfriend, Larry Harvey. Special Agent DiScenza then walked from the waiting area to where Larry Harvey had been stopped and asked him if he knew Tunya Poitier. Harvey replied that he barely knew her and had just met her in Miami. Special Agent DiScenza testified that he walked back to defendant, told her they believed she might be

transporting drugs, and formally advised her of the Miranda warnings. Detective Hudson testified that at the conclusion of the Miranda warnings, he asked defendent if she was carrying drugs. She responded quickly that she was not going to take the rap for anyone else. Defendant was escorted to a nearby searching area and asked if she had any objections to a search. When defendant indicated she had no objections, a female police officer escorted her to a storage room where defendant retrieved two bags of cocaine from her underclothing and gave them to the female officer. Defendant was subsequently formally advised of her Miranda rights a second time, this time in writing. After the execution of the Miranda warnings rights form, defendant gave the police officers a written statement as to her involvement in the instant offense.

II.

DECISION

After carefully considering the evidence and argument of counsel, the Court finds:[1]

The initial contact of officers with defendant was intended to be a limited investigative stop - a so-called Terry stop, as opposed to a full blown arrest, requiring probable cause.

As an investigative detention, an adequate justification for the detention or intrusion must exist. It is plain that the Fourth Amendment requires that reasonable suspicion support this type investigative stop. It is further plain that an officer's subjective goodfaith or

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[1] The Court, at the close of the presentation of testimony, ruled immediately from the Bench, but reserved the right to file a written order supplementing its ruling. This order is being submitted now as a supplement to the ruling from the Bench.

hunches are insufficient. The encounter is to be based on objectively reasonable and articulable suspicion. The officer must be able to point to specific and articulable facts, which taken together with rational inferences from these facts, reasonably warrant that intrusion. United States v. Borys, 766 F.2d 305 (1985).

The Court is not persuaded that reasonable suspicion supported this investigative stop involving the defendant here. Stated differently, there was no articulable suspicion that defendant had committed or was about to commit a crime.

Special Agents' belief that defendant and Harvey were endeavoring to conceal the fact that they were travelling together and the disclosure that the tickets they used were purchased on the same date, by payment of cash, and the same phone number was designated for further communication are circumstances that could very well describe a variety of other travelers making use of

airport facilities. For example, a married person making a trip with another who is not his or her spouse. The fact that defendant and Harvey occupied seats in different sections of the plane could have been premised on the fact that one was a smoker and elected to be seated in the smoking area while the other choose the nonsmoking area. In short, the Court is not persuaded that circumstances observed by the agents a [sic] Atlanta and Little Rock were sufficient to support the intrusion and seizure in this case. See, Reid v. Georgia, 448 U.S. 438.

Further, when the Little Rock officers displayed their identification and "gestered" to defendant to move to a seated area located to the side concourse, the Court is of the view that a reasonable person in this posture would not have felt free to terminate the interrogation conducted by the officer and depart from the airport. Really, what was intended as a so-called

Terry stop evolved, from its inception, into a de facto arrest of the defendant. Thus, the purported admissions made by defendant, the consent to the search of her person and seizures were the product of the illegal detention and coercion and, therefore, involuntary. The Court further holds that the Miranda warnings which were given, in the context of the totality of the circumstances existing, do not minimize or absolve the unconstitutional intrusion here. Accordingly, defendant's motion to suppress is granted.

IT IS SO ORDERED.

Entered non nuc pro tunc this 2nd day of April, 1986, at [sic] of March 19, 1986.

/S/ GEORGE HOWARD, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1616

United States of America,	*	
	*	
Appellant,	*	APPEAL FROM THE UNITED
	*	STATES DISTRICT COURT
-vs-	*	FOR THE EASTERN DISTRICT
	*	OF ARKANSAS.
Tunya Reginera Poitier,	*	
	*	
Appellee.	*	

Submitted: February 13, 1987

Filed: May 13, 1987

Before BOWMAN and MAGILL, Circuit Judges, and HARPER, Senior District Judge.*

MAGILL, Circuit Judge.

In this case we examine whether the district court correctly ordered suppression of evidence obtained

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*The HON. ROY W. HARPER, United States Senior District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

through a search at an airport. We conclude that the district court erred in suppressing the evidence, and accordingly we reverse.

THE FACTS.

At about 11:30 a.m. on December 19, 1985, Special Agent Paul Markonni of the Drug Enforcement Administration (DEA) was at Gate A-20 of the Atlanta Airport in Atlanta, Georgia, watching the arrival of Delta Airlines Flight No. 817 from Miami, Florida. He saw the appellee, Tunya Reginera Poitier, leave the plane, approach a Delta agent, and request information as to her connecting flight to Little Rock, Arkansas. Following the Delta agent's direction, Poitier headed for Gate A-7. Markonni noted that Poitier was "very well dressed" and carrying a coat over her arm, but he noticed nothing unusual or suspicious about her.

A few seconds later, however, Markonni saw a man later identified as Larry Gene Harvey walk past and quickly follow Poitier, tracking her route, down the

concourse toward Gate A-7. Another DEA agent told Markonni that Harvey had also left Flight No. 817. Harvey was casually dressed, wearing blue jeans and a black leather jacket with a distinctive fish scale design on the back. Harvey caught up to Poitier and they walked side by side, maintaining about five feet between them, yet they appeared to be speaking to each other. Markonni suspected that they might be trying to conceal the fact that they were traveling together. He had in the past seen drug couriers do this to avoid the possibility of both being arrested should an arrest take place.

Markonni followed Harvey and Poitier to Gate A-7, saw them get together, give their tickets to the Delta agent, and get on Delta Flight No. 705 to Little Rock, Arkansas. Markonni then retrieved the two tickets from the Delta agent, and saw that the names on the tickets were Tunya Poitier and Al Harvey and that the tickets were sequentially numbered, were both purchased for cash, and had an identical travel schedule, Miami to Atlanta

and Atlanta to Little Rock. Markonni got a copy of the passenger name record for Poitier and Harvey, reconfirmed that they had identical itineraries, and also noted that they had used the same telephone number in Miami as a reference number, but that they had made their reservations separately and were seated in separate sections of the plane for both legs of the flight. He also found that their separate reservations had been made within the same minute. Markonni then called the Miami telephone number listed on the reservation records, and the woman answering told him that she knew Poitier, but not Al Harvey, and that Poitier would be returning the following day. Markonni then telephoned Special Agent Gary Worden of the DEA office in Little Rock, Arkansas, and told him all the information he had gained as to Poitier and Harvey and gave physical descriptions of the two.

Based on this information, DEA agents in Little Rock decided to establish a surveillance team at the Little Rock airport to watch Flight No. 705 from

Atlanta. During a debriefing session before the plane landed, the team was told to let Harvey and Poitier go on their way if they did not want to cooperate with the officers or answer questions. After 4:00 p.m. that afternoon, the surveillance team saw two people matching the descriptions of Harvey and Poitier leaving Flight No. 705. Harvey left the plane before Poitier and walked at first approximately 15 to 20 feet ahead of her, but she eventually caught up with him and they spoke, although walking about four feet apart. Little Rock narcotics detective David Hudson and DEA Special Agent Edward DiScenza then approached Poitier from both sides and DiScenza produced DEA credentials, while another five or six federal and local agents stopped Harvey in the same area. DiScenza told Poitier that he wanted to ask her some questions, she agreed, and he suggested that they move out of the main concourse towards the lesser-populated waiting area of Gate 1 of the terminal. DiScenza asked Poitier her name and for identification, which she provided. He asked her where

she was from, and she replied that she was from Miami, Florida. When asked what she was doing in Little Rock, Poitier stated that she was there to party for a few days with her boyfriend. She identified Harvey as her boyfriend and said she had known him for about six months.

DiScenza walked over to Harvey and asked him if he knew Poitier. Harvey said that he barely knew her and had just met her in Miami. The inconsistent information made DiScenza suspicious and he told Poitier that he suspected her of carrying drugs from Florida. He gave her oral Miranda warnings, and she told him that she understood them. Then Hudson asked her directly if she was carrying drugs and she answered that she was. When asked what type of drugs she was carrying, she answer cocaine. She was then placed under arrest and searched, and about one kilogram of cocaine was found.[1]

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[1] Poitier's testimony presented a very different series of events. According to her, Agents Hudson and DiScenza stopped her by each grabbing one of her arms. The agents asked her name and then, without releasing her arms, they steered her over to the waiting area,

II. DISTRICT COURT PROCEEDINGS.

After being indicted by a grand jury on charges of conspiracy to distribute cocaine and possession with intent to distribute cocaine, Poitier moved to suppress the cocaine seized from her at the airport, as well as statements she made when detained. The district court examined whether the detention was supported by a reasonable and articulable suspicion that she had committed or was currenty committing a crime. The court stated that the initial contact by the officers with Poitier was intended to be a limited investigative stop, also known as a Terry-type stop, which requires reasonable suspicion by the officer. Terry v. Ohio, 392 U.S. 1

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where they told her to sit down and stay right there, because they were going to ask her some more questions. While seated, she was asked for identification, which she produced from her purse. DiScenza then took her purse and began going through it. She testified that her identification and purse were not returned to her until later, at the police station. The district court in its oral ruling, however, expressly accepted the agents' version of the facts.

(1968). To validate such a stop, the officer must be able to point to specific and articulable facts, which taken together with rational inferences from these facts, reasonably warrant the intrusion. United States v. Borys, 766 F.2d 304, 308 (7th Cir. 1985), cert. denied, 106 S.Ct. 852 (1986).

The district court concluded that there was not sufficient reasonable suspicion that Poitier had committed or was about to commit a crime to jusitfy the intrusion and seizure in this case. The court further found that when the officers showed their identification and gestured to Poitier to move to the waiting area, a reasonable person in Poitier's position would not have felt free to stop the questioning and leave. The court characterized the intended Terry-type stop as a de facto arrest from its inception. The district court thus granted Poitier's motion to suppress.

III. DISCUSSION.

Our starting point is to determine the nature of the encounter between the agents and Poitier. More spe-

cifically, we must determine whether Poitier was seized, and if so, at what point; and, if Poitier was seized, was there objective justification sufficient to create reasonable suspicion that she was engaging in criminal activity.

As this court noted in United States v. Wallraff, 705 F.2d 980, 988 (8th Cir. 1983), Supreme Court jurisprudence has placed police-citizen encounters between officers and citizens that are consensual and involve no coercion or restraint of liberty. Such encounters are outside the scope of the Fourth Amendment. Second, there are the so-called Terry-type stops. These are brief, minimally intrusive seizures but which are considered significant enough to invoke Fourth Amendment safeguards and thus must be supported by a reasonable suspicion of criminal activity. Third, there are highly intrusive full-scale arrests, which must be based on probable cause.

Reviewing the record, we are unable to agree with the district court that the agents' initial contact with

Poitier fell into the category of an investigative, Terry-type stop. We accept the district court's findings of fact and cannot say that they are clearly erroneous. The only issue is the application of the law to those facts. The applicable standard of review in this area is subject to some confusion, namely, whether a trial court's conclusion as to Fourth Amendment custody is a question of fact or a conclusion of law. See United States v. Ceballos, 812 F.2d 42, 47 n.1 (2nd Cir. 1987). This circuit, however, has settled upon the "clearly erroneous" standard in reviewing the district court's determinations, made in the context of a motion to suppress, as to the existence of circumstances justifying a warrantless arrest. Wallraff, 705 F.2d at 987.

We conclude, under this standard of review, that the district court misapplied the pertinent case law to the facts at issue. The district court found that "when the Little Rock officers displayed their identification and 'gestered' [sic] to defendant to move to a seated

area located to the side of the concourse * * * a reasonable person in this posture would not have felt free to terminate the interrogation conducted by the officer and depart from the airport." Our review of the cases convinces us, however, that more is required to turn consensual questioning into a Terry-type investigative stop than the display of badges, the request for information, and the suggestion that the parties move to a nearby area out of the flow of traffic.

We are guided in this regard by the similar case of Florida v. Rodriguez, 469 U. S. 1, 3-4 (1984). In Rodriguez a police officer stationed at the Miami airport noticed three men behaving furtively. The officer then faced one of the men, showed his badge, and asked him if they might talk. The man agreed, and the officer suggested that they move approximately 15 feet to where the other two men were standing. They remained in the public area of the airport. The officer then asked for identification and an airline ticket, which one of the three men produced. When asked their names, one of the

men gave a name different from the one on the ticket. At this point, another officer told the suspects that they were narcotics officers and asked one of the suspects for consent to search his luggage. The Supreme Court noted:

> The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest. United States v. Mendenhall, [446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)] (opinion of Stewart, J.); Florida v. Royer, [460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983)] (opinion of WHITE, J.). Assuming, without deciding, that after respondent agreed to talk with the police, moved over to where his cohorts and the other detective were standing, and ultimately granted permission to search his baggage, there was a "seizure" for purposes of the Fourth Amendment, we hold that any such seizure was justified by "articulable suspicion."

Rodriguez, 469 U.S. at 5-6. See also United States v. Morgan, 725 F.2d 56, 57 (7th Cir. 1984); United States

v. Ehlebracht, 693 F.2d 333, 338 (5th Cir. 1982); United States v. Black, 675 F.2d 129, 132 (7th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); United States v. Deggendorf, 626 F.2d 47, 52-53 (8th Cir.), cert. denied, 449 U.S. 986 (1980).

We note further that the officers in this case were not in uniform, were not openly displaying weapons, and according to their testimony did not physically touch Poitier. "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." United States v. Mendenhall, 446 U.S. 544, 553 (1980). We conclude that there was no such restrain in this case, at least not until Harvey and Poitier gave the agents inconsistent information.

We next examine whether the agents' telling Poitier that they suspected her of carrying drugs, followed by their giving her Miranda warnings and asking her whether she was carrying drugs, elevated the encounter to a Terry-type stop and if so, whether it was permissible under the Fourth Amendment.

Although the encounter between Poitier and the agents began as a consensual one we conclude that when the agent stated that they suspected Poitier of carrying drugs and read her Miranda rights, at that point a reasonable person would not have felt free to leave. The accusation, coupled with the Miranda warnings, create a sufficient show of authority to effectively restrain Poitier's freedom of movement. Mendenhall, 446 U.S. at 553-54. We thus turn to an examination of the legality of the Terry-type stop.

In order to pass Fourth Amendment scrutiny, a Terry-type stop must be based on a reasonable articulable suspicion of criminal activity, rather than mere conjecture or hunches. In deciding whether the requisite degree of suspicion exists, we view the agents' observations as a whole, rather than as discrete and disconnected occurrences. Further, these observations must be viewed through the eyes of persons who, like the agents in this case, are trained to cull significance from behavior that would appear innocent to the

untrained observer. See United States v. Wallraff, 705 F.2d 980, 988 (8th Cir. 1983). Until Poitier and Harvey were questioned by the agents, the only basis the agents had for suspecting them of carrying drugs was that they showed certain characteristics of the "drug courier profile."[2] Under Reid v. Georgia, 448 U.S. 438, 440-41 (1980), the mere fact that a suspect fits the "drug courier profile" may not be the basis for reasonable suspicion of criminal activity. The record reflects, however, that upon being questioned as to their relationship, Poitier's answers conflicted sharply with Harvey's. A suspect's displaying characteristics of the drug courier profile, when coupled with untruthful answers given to police questioning, together may constitute sufficient basis for an investigative, Terry-type seizure. See Borys, 766 F.2d at 311-12. Thus we conclude that the investigative Terry-type stop properly began after the discrepancies were found in the stories.

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[2] The "drug courier profile" is an informal compilation of characteristics often displayed by those trafficking in drugs. It is noteworthy that Special Agent Markonni, who initially noticed Poitier and Harvey in this case, developed the drug courier profile and is

Because Poitier's detention was supported by reasonable suspicion, we must now examine whether it was properly limited in scope and duration. The purpose of the stop was to verify or dispel the agents' suspicion that Poitier was trafficking in illegal drugs, a legitimate and substantial government interest. From the time the consensual encounter ripened into a Terry-type investi-

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known as an extraordinarily effective DEA agent. See United States v. Ehlebracht, 693 F.2d 333, 335 n.3 (5th Cir. 1982). In this case, the agents' attention was attracted by the following facts considered to be within the profile: Harvey and Poitier departed from Miami, a drug center, they bought airline tickets in cash, and they apparently tried to disassociate themselves from each other, both during the flights and in the Atlanta and Little Rock airports.

We reject Poitier's contention that her actions leading to the contact with the agents could also be interpreted as manifestations of wholly innocent behavior. For example, she points out that the separate seating arrangements on the planes were because Harvey smoked and she didn't, and that they walked down the concourse separately because each was hurrying to catch the next flight. As other courts have pointed out, "[i]t must be rare indeed that an officer observes behavior consistent only with guilt and incapable of innocent interpretation." United States v. Rickus, 737 F.2d 360, 365 (3d Cir. 1984), quoting United States v. Price, 599 F.2d 494, 502 (2d Cir. 1979).

gative detention (i.e., when the agents received inconsistent information) to the time Poitier was placed under arrest, no more than a minute passed. During this brief time Poitier was given Miranda warnings, was told that she was suspected of carrying drugs, admitted to carrying drugs, and identified them as cocaine. The agents did not take Poitier anywhere during this time, nor did they ask more than two questions—whether she was carrying drugs, and of what type. Thus the Terry-type stop in this case was exceedingly limited in scope and duration.

Regarding the propriety of the actual arrest, we need only say that in light of the foregoing, there was sufficient probable cause to arrest and search Poitier when she admitted that she was carrying cocaine.

Accordingly, we reverse the judgment of the district court ordering suppression of the evidence in this case.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1616-EA

United States of America,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court
vs.	*	for the Eastern District
	*	of Arkansas
Tunya Reginera Poitier,	*	
	*	
Appellee.	*	

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judge Heaney, McMillian and Arnold would have granted the petition.

Petition for rehearing by the panel is also denied.

July 30, 1987

Order Entered at the Direction of the Court:

/S/ ROBERT D. ST. VRAIN

Clerk, United States Court of Appeals, Eighth Circuit

No. 87-694

In the Supreme Court of the United States

OCTOBER TERM, 1987

TUNYA REGINERA POITIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

In the Supreme Court of the United States

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No. 87-694

TUNYA REGINERA POITIER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence that was obtained as a result of a seizure of cocaine from petitioner at an airport.

On January 22, 1986, petitioner was indicted by a federal grand jury sitting in the Eastern District of Arkansas. She was charged with conspiring to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and with possessing cocaine with intent to distribute it, in violation of 21 U.S.C. (& Supp III) 841(b)(1)(B). The cocaine was seized from her by a police officer and Drug Enforcement Agents following an encounter at the Little Rock, Arkansas, airport. Petitioner moved to suppress both the cocaine and the inculpatory statements she subsequently made to law enforcement officers.

The district court granted the motion. The court concluded that the officers' initial contact with petitioner constituted an investigative *Terry* stop and that it was not supported by reasonable suspicion. See *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court found that when the officers

showed their identification and gestured to petitioner to move to the waiting area, a person in petitioner's position would not have felt free to leave without answering questions. The court also characterized the stop as an arrest from its inception (Pet. App. 1-10).

The court of appeals reversed (Pet. App. 11-27). The court concluded that the initial contact between the officers and petitioner was consensual and involved no coercion or restraint of liberty. The court further found that, after petitioner and her companion gave inconsistent information, the encounter turned into a *Terry* stop when the agents told petitioner that they suspected her of carrying drugs and gave her *Miranda* warnings. Nonetheless, the court held, the agents had sufficient grounds for the stop, and the stop was properly limited in scope and duration (*ibid.*).

Petitioner contends (Pet. 12-20) that she was detained without reasonable suspicion after the officers encountered her at the airport. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position she would have occupied if the district court had denied her motion to suppress. If petitioner is acquitted following a trial on the merits, her contentions will be moot. If, on the other hand, petitioner is convicted and her conviction is affirmed on appeal, she will then be able to present her contentions to this Court, together with any other claims she may have, in a petition for a writ of certiorari seeking review of a final judgment against her. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1987

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